BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2021-114-E -- ORDER NO. _____

IN RE:

PETITION FOR DECLARATORY ORDER WITH VERIFICATION OF ORANGEBURG COUNTY SOLAR PROJECT, LLC AND ORANGEBURG SOUTH SOLAR PROJECT, LLC BOTH WHOLLY OWNED SUBSIDIARIES OF SAVION, LLC

(PROPOSED)

ORDER

This matter comes before the Public Service Commission of South Carolina ("the Commission") by way of a Petition filed by Orangeburg County Solar Project, LLC and Orangeburg South Solar Project, LLC, both wholly owned subsidiaries of Savion, LLC ("Petitioners"). The Petition seeks a declaratory order that:

1. The Orangeburg County Solar Project and Orangeburg South Solar Project (collectively "the Projects") do not meet the definition of a major utility facility, as defined in S.C. Code § 58-33-20, merely because they will share a single 200-foot 230kV generation tie (gen-tie) line;
2. The Projects do not meet the definition of a major utility facility, as defined in S.C. Code §58-33-20(a), because each project will operate at a capacity less than 75 MW;
3. Because the Projects do not meet the definition of a major utility facility, as defined in S.C. Code § 58-33-20, the Petitioners are not required to obtain a Certificate of Environmental Compatibility pursuant to S.C. Code § 58-33-10, et seq.

Petition at 1, 5-6.

The parties to this proceeding are the Petitioners, the South Carolina Office of Regulatory Staff ("ORS"), Intervenor Dominion Energy South Carolina, Inc. ("DESC") and Intervenor Carolinas Clean Energy Business Association ("CCEBA").

DESC opposes the relief requested by Petitioners asserting that the Projects' MWdc capacity is determinative of whether the Projects are "major utility facilities" under the South Carolina Facility Siting and Environmental Protection Act , S.C. Code § 58-33-10, et seq ("the Siting Act"). ORS and the Petitioners urge this Commission to use the MWac capacity as limited by inverters as the measure for whether the Siting Act's 75 MW threshold is triggered.

On October 20, 2021, the Commission heard oral arguments from Petitioner, ORS, and DESC. Counsel for Petitioners, ORS, and DESC participated in the oral argument. Shortly after the oral argument CCEBA moved to intervene, which intervention was approved by this Commission on November 2, 2021.

During the October 20, 2021, oral argument counsel for ORS cited to several previous Commission decisions. Upon review of the referenced dockets, the Commission found that in at least two of the cases DESC (through its predecessor entity SCE&G) presented for Commission approval power purchase agreements for solar projects with 230kV generation tie (gen-tie) lines similar to the one to be used with the Projects. In several other dockets DESC (through its predecessor entity SCE&G) presented for Commission approval power purchase agreements for facilities with greater than 75 MWdc without a Certificate of Environmental Compatibility.

The South Carolina Siting Act Hinges on a Facility's Designed Operational Capability.

The Siting Act requires Commission review and certification of any "major utility facility," a term defined in the statute to be an electric generating plant and associated facilities "designed for, or capable of, operation at a capacity of more than seventy-five megawatts." S.C. Code § 58-

33-20(2)(a). The reference to a facility's operational "design" characteristics likewise applies to transmission facilities covered by the Act. An electric transmission line is defined as a "major utility facility" subject to certification review where its "designed operating voltage" is 125 kilovolts or more, with "electric distribution lines and associated facilities" excluded from that definition regardless of size or capacity. S.C. Code § 58-33-20(2)(b).

As this language makes plain, the S.C. General Assembly keyed Commission review to a plant's "designed" operational capability rather than its theoretical maximum output. The Legislature could have chosen to define facilities with reference to maximum potential to generate – regardless of operational design limitations – but it chose not to. Instead, it used a form of the word "design," which means "to create, fashion, execute, or construct *according to plan*." Merriam Webster Dictionary.[1] For determining whether a facility is subject to Siting Act review, the Commission must thus consider the facility's intended, planned, and actual operational capability – not theoretical maximums of individual equipment regardless of operational controls, contractual limits, or other "facilities" (i.e., inverters) specifically mentioned by the statute.

The Siting Act's Focus on Design Operational Capability Accords With Federal Authority.

The Siting Act's focus on the designed capability of the plant and associated facilities to generate power to meet load accords with analogous federal definitions. For example, the U.S. Energy Information Administration's definition of "generator capacity" means maximum output that a "generating equipment can *supply to system load*, adjusted for ambient conditions."[2] Similarly, in the Federal Energy Regulatory Commission (FERC) recently held that, for the purposes of determining whether a renewable energy plant qualifies as a qualifying facility ("QF")

[1] *See* https://www.merriam-webster.com/dictionary/design.
[2] *See* https://www.eia.gov/tools/glossary/index.php?id=Generator%20capacity.

under the Public Utility Regulation Act ("PURPA"), 16 USC §§ 2601 *et seq.*, the statutory 80 MW limitation capacity limit is determined with reference to the "facility's *net output to the electric utility* (i.e., at the point of interconnection), taking into account all components necessary to produce electric energy in a form useful to an interconnected entity." FERC, Order on Broadview Rehearing at 14 (March 19, 2021) *on appeal,* D.C. Cir. No. 21-1126 (emphasis added), which is hereby incorporate by reference.

In reaffirming this "send out" test, FERC addressed the presence of battery storage at the Broadview solar facility. FERC observed that while "Broadview's configuration allows it to more consistently deliver a higher share of the 80 MW power production capacity, that configuration does not change the fact that the Broadview facility is not actually capable of providing more than 80 MW at any one point in time at its point of interconnection with [the utility]." *Id*. at 18. Thus, while storage "effectively increases the Broadview facility's capacity factor," FERC concluded that it "it does not change the Broadview facility's 'power production capacity' or call into question our longstanding reliance on the 'send out' analysis to measure power production capacity." *Id*.

FERC also concluded that power production capacity of a facility like Broadview's should be measured "at the point of interconnection" because "inverters are an integral part of a solar PV facility's generation equipment and are necessary to produce power in a form useful to the interconnecting utility" and a "solar-PV QF can produce power for delivery to the purchasing utility only to the extent enabled by the inverters because the grid operates predominantly using AC power." Id. at 19. FERC went on to note that the Broadview facility's interconnection agreement sized the facility "based on the max output of the inverters." *Id*. p. 20 n.94

Taken together, the language of the Siting Act as well as definitions from U.S. EIA and FERC all support the conclusion that Siting Act applicability turns on whether a plant "and associated facilities" are designed for or capable of supplying more than 75 megawatts to system load, adjusting for ambient conditions. Since it is undisputed that Savion's plants are designed to deliver and capable of delivering no more than 75 megawatts of power to load, they do not require Siting Act review and certification.

DESC's Arguments for Using the Theoretical Maximum Capacity of all Components Are Unavailing.

Intervenor DESC makes several policy-based arguments said to support the use of a theoretical maximum capacity test for determining Siting Act applicability. As discussed below, none alter our view that application of the Siting Act must and should turn on a plant's actual designed level of output to the grid.

First, DESC contends that its position is supported by the importance of the Siting Act's environmental and public benefits. To be sure, the Commission agrees with Dominion regarding the Siting Act's value in ensuring that environmental impacts are considered and kept to a minimum given available generation technologies. The Commission notes, however, that such impacts are not limited to land use: certification proceedings also involve analysis of water pollution and consumption, as well as the emission of air pollutants. Nothing in the record indicates that Savion's facilities consume any water, or emit any pollution whatsoever into the water or air. More important, regardless of one's policy views, application of the Act does *not* turn upon a facility's emissions or pollution profile, unlike certain environmental permitting statutes. *See, e.g.*, *Environmental Defense v. Duke Energy*, 549 U.S. 561 (2007) (holding that the Clean Air Act's New Source Review program is triggered by tons of pollution emitted by electrical generating stations per year). Instead, the General Assembly predicated the Siting Act's

application on the megawatts a plant produces, regardless of environmental impact. We are bound to follow that decision.

Second, DESC argues that a test premised on actual designed production levels could lead to facilities trying to "game" the system by building facilities whose output is limited below the 75 MW threshold and then increasing their output in the future after having been constructed without a certification. In the present case there is zero evidence that Savion's plants could be changed in that manner even if the owner wanted to, and indeed Savion stated the opposite: the inverters operationally limit their physical output. Further, the notion that facilities subject to legally enforceable interconnection and power purchase agreements specifying maximum megawatt output levels would nonetheless violate those agreements strains credulity. Since generation projects depend upon ongoing interconnection and power purchases for their economic viability, increasing their production beyond specified levels would lead to removal from the grid and loss of their revenue streams. DESC provided no basis to think that project developers would willingly commit such financial suicide.

Finally, it bears mentioning that DESC's proposed applicability test would require the Commission to delve into the theoretical energy output of a plant's various components. This seems unworkable as a practical matter and would not lead to sensible outcomes. For example, investigating a plant components' theoretical maximum output could lead the Commission to consider the plant's fuel supplies (e.g., tanks and pipelines) and the potential that such component facilities could one day allow larger output than possible from a plant as presently configured. The Commission finds it doubtful that the General Assembly intended to christen such theoretical fishing missions. The Siting Act sets forth practical standards keyed to a plant's designed

operational capabilities, and the Commission sees every reason to follow the law as written and apply it practically.

In the end, Siting Act applicability should be determined using the designed generating capability of an electrical facility and not the theoretical maximum capacity of its individual components.

ORS Disagrees with DESC's Arguments for Using the dc Theoretical Maximum Capacity of all Components.

During the October 20, 2021 Oral Argument, counsel for the Office of Regulatory Staff was asked by Commissioner Ervin about DESC's assertion that "the AC setting is irrelevant; the AC inverter setting for solar panels is irrelevant to the question of the Commission's jurisdiction under the Siting Act. It is the DC rating of the solar panels." Tr. at 40. Counsel for ORS explained that ORS does *not* use the DC rating; instead ORS relies upon, as Petitioners and Intervenors CCEBA agree, the MWac rating:

> To be clear, ORS does interpret the 75 megawatt threshold under the Siting Act as being applicable to AC. I believe that's how it's been interpreted traditionally by ORS, as well as - my understanding is - by the Commission, and the utilities and developers. Moreover, as highlighted multiple times, under the Siting Act, electric - the term "major utility facility" means electric - and this is in part - electric generating plant and associated facilities designed for or capable of operation at a capacity of more than 75 megawatts.
> As Mr. Gissendanner mentioned earlier, the utility system itself functions on AC. As a result, a facility could not be designed for or capable of operation by being injected onto the utility's system unless itself was AC. And that really underpins our interpretation as to why the 75 megawatts is applicable to AC.
> For that reason and based on the responses given by the Orangeburg Solar Developers in this case, ORS did make the determination that the 75 megawatt

24 threshold was not triggered in this proceeding.

Tr. at 42. Further explaining ORS's position later in the hearing, ORS counsel stated, "Because it functions at AC, we believe that the designed-for-or-capable-of-operation implicitly is AC, and that's how ORS has interpreted it." Tr. at 61.

ORS's practice and procedure as well as previous decisions of this Commission support the Petitioner's position that the AC megawatt output rating is the fact at issue for triggering the Siting Act. In other words, there are multiple Commission Dockets wherein the facility owner was not required to obtain Siting Act approval, despite the fact that the DC capacity of the projects exceeded 75 megawatts; for all of these projects the AC capacity was limited to less than 75 megawatts. Since 2016, Intervenor DESC (formerly South Carolina Electric & Gas) has participated in at least 9 dockets before the Commission wherein the subject of the proceeding was a power purchase agreement between SCE&G and a solar developer. In every purchase agreement supported by SCE&G in these dockets, the solar facility at issue was described by its MW-AC generation. In some instances, the power purchase agreement signed and submitted by SCE&G relate to facilities with less than 75 MWac but with a reported MWdc that is greater than 75MW. In those cases SCE&G did <u>not</u> raise the Siting Act based on MWdc required further action by the developer and SCE&G affirmatively sought approval without Siting Act submissions.[3] The dockets cited were:

2016-100-E - Moffett Solar 1, LLC;

2017-143-E - Shaw Creek Solar, LLC;

2017-160-E - Palmetto Plains Solar Project, LLC;

[3] A review of filings in each of these dockets reinforces the position asserted by Petitioner, ORS, and CCEBA – DESC's own agreements reflect a consistent reference to MWac as the measure of the size of a facility.

2017-184-E - Huntley Solar, LLC;

2017-185-E - Lily Solar, LLC;

2017-188-E - Seabrook Solar, LLC;

2018-75-E - Midlands Solar, LLC;

2018-84-E - TWE Bowman Solar Project, LLC; and

2018-193-E - Whistlestop Solar, LLC.

In one particular case, *In Re: Renewable Power Purchase Agreement between South Carolina Electric & Gas Company and Shaw Creek Solar, LLC*, Docket 2017-143-E, SCE&G asked this Commission to approve its power purchase agreement with a facility that is described in the agreement signed by SCE&G as including "approximately 108 MWdc of solar PV modules" and "a 230 kV tie line…approximately 100' in length." SCE&G did not suggest or demand, as it has here, that this facility be subject to the Siting Act because of its MWdc greater 75 or for its 230 kV tie line.

In another case, *In Re: Renewable Power Purchase Agreement between South Carolina Electric & Gas Company and Whistletop Solar LLC*, Docket 2018-193-E SCE&G asked this Commission to approve another power purchase agreement. In this instance, the agreement signed by SCE&G states "The plant will include approximately 108 MWdc of solar PV modules." The agreement goes on to describe the facility as including a 230kV "tie line … approximately 1000' in length." SCE&G did not ask the Commission to subject the facility to the Siting Act. Yet here, DESC says any time a MWdc rating is greater than 75 MW then the Siting Act must apply. Further, here DESC takes the even more exaggerated position that the 200-foot 230kV line connecting the projects mandates compliance with the Siting Act when it said nothing of the sort when it supported approval of its agreement with the Whistlestop project that included 1000 feet of 230kV line.

This Commission will not allow DESC to play fast and loose with statutory construction, conceal these previous cases to which it was a party, and then accuse the Petitioners of not being transparent with this Commission.

DESC's new interpretation of the Siting Act in this case is not only contrary to ORS's reading of the statute, it is contrary to DESC's previous positions before this Commission. Clearly, DESC has previously sought approval of its contracts with solar providers when the same circumstances existed in those cases that DESC now claims should requires Petitioners to be required to go through the costly and time-consuming process of obtaining a certification pursuant to the Siting Act. DESC's position in this matter is not consistent with the statute, it is not consistent with ORS's reading of the statute, and it is not consistent with DESC's own positions before this Commission.

Conclusion

Because Savion's plants are designed to generate no more than 75 megawatts to serve load and are not capable of producing more for that purpose, they are not subject to Siting Act review. To the extent that the 200' 230kV line at issue might trigger the Siting Act, the Commission finds that its previous rulings *In Re: Renewable Power Purchase Agreement between South Carolina Electric & Gas Company and Shaw Creek Solar, LLC*, Docket 2017-143-E (involving 200' line) and *In Re: Renewable Power Purchase Agreement between South Carolina Electric & Gas Company and Whistletop Solar LLC*, Docket 2018-193-E (involving 1,000' line) are persuasive and justify the declaration sought by Petitioners. Accordingly, the Petition is granted and it is hereby ordered that:

1. The Projects do not meet the definition of a major utility facility, as defined in S.C. Code §58-33-20(a), because each project will operate at a capacity less than 75 MW;

2. The Projects do not meet the definition of a major utility facility, as defined in S.C. Code §58-33-20(b), merely because they will share a single 200-foot 230kV generation tie (gen-tie) line;

3. Because the Projects do not meet the definition of a major utility facility, as defined in S.C. Code §58-33-20, the Petitioners are not required to obtain a **Certificate of Environmental Compatibility pursuant to** S.C. Code §58-33-10, et seq.; and

4. In accordance with the Siting Act, the Petitioners are required to apply for a Certificate if they increase the capacity of either of the Projects beyond the seventy-five (75) MW threshold in the future.

IT IS SO ORDERED.

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Justin T. Williams, Chairman
Public Service Commission of
South Carolina

September ____, 2021